Supreme Court, U.S.
FILED
OCT 14 1997
CLERK

No. 97-289

In the Supreme Court of the United States

OCTOBER TERM, 1996

TANA WOOD,

Petitioner,

vs.

PATRICK JAMES JEFFRIES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS W. HILLIER, II
PETER OFFENBECHER
ROBERT C. OWEN
Federal Public Defender
1111 Third Ave., Ste. 1100
Seattle, WA 98101
(206) 553-1100

ROBERT S. MAHLER
MacDonald, Hoague, & Bayless
705 Second Avenue
15th Floor
Seattle, WA 98104
(206) 622-1604

STEPHANIE ROSS*
345 Knechtel Way
Suite 100B
Bainbridge Island,
WA 98110
(206) 780-8276

Counsel for Petitioner
*Counsel of Record

35 pp

QUESTION PRESENTED (RESTATED):

Did the court below err in following the previously established law in this case, which this Court declined to review?

TABLE OF CONTENTS

Page No.:

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

A. The Decision below Merely Followed the Previously Established Law of the Case, Which this Court Previously Declined to Review. 8

B. At Least since *Brecht*, No Circuit Court Has Presumed Prejudice When Reviewing Claims of Juror Misconduct Raised by State Prisoners in Federal Habeas Corpus Proceedings. 12

C. The Application of *Brecht v. Abrahamson* to the Jury Misconduct in this Case No More Warrants this Court's Review Now than it Did in 1994. 16

CONCLUSION 23

TABLE OF AUTHORITIES

Page No.:

Cases Cited:

Arizona v. Fulminante, 499 U.S. 279, 306-10 (1991) 13

Bayramoglu v. Estelle, 806 F.2d 880 (9th Cir. 1986) 20

Bibbins v. Dalsheim, 21 F.3d 13 (2d Cir.),
cert. denied, 513 U.S. 901 (1994) 12-13

Blodgett v. Jeffries, 510 U.S. 1191 (1994) 6, 11

Bonner v. Holt, 26 F.3d 1081 (11th Cir. 1994),
cert. denied, 514 U.S. 1010 (1995) 13

Borja v. Prunty, 866 F. Supp. 451 (S.D. Cal. 1994) 9

Brecht v. Abrahamson, 507 U.S. 619 (1993) ..... *passim*

Burgett v. Texas, 389 U.S. 109 (1967) 24

1 *Burr's Trial* 416 (1807) 24

Chapman v. California, 386 U.S. 18 (1967) 13

Christianson v. Colt Industries Operating Corp., 486 U.S. 800 (1988) 8, 10

Custis v. United States, 511 U.S. 485 (1994) 24

Dyer v. Calderon, 1997 WL 559868 (9th Cir. Aug. 19, 1997)
(*to be reported at* 122 F.3d 720) 14

Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981) .. 21

Irvin v. Dowd, 366 U.S. 717 (1961) 24

Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993) 6, 18, 20

Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) (*en banc*) ..... *passim*

TABLE OF AUTHORITIES

Page No.:

Cases Cited:

Lawson v. Borg, 60 F.3d 608 (9th Cir. 1995) 9, 14

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir.),
cert. denied, 116 S. Ct. 407 (1995) 10

Little Earth of the United Tribes, Inc., v. United States Dep't of Housing & Urban Dev., 807 F.2d 1433 (8th Cir. 1986) 9

Mattox v. United States, 146 U.S. 140 (1892) 18

Old Chief v. United States, 117 S.Ct. 644 (1997) 18

O'Neal v. McAninch, 513 U.S. 432 (1995) 16

Pennington v. Doherty, 110 F.3d 502 (7th Cir. 1997), *petition for cert. filed,*
66 U.S.L.W. 3086 (U.S. July 3, 1997) (No. 97-58) 9

Reeves v. AcroMed Corp., 103 F.3d 442 (5th Cir. 1997) 9

Rodriguez v. Marshall, No. 96-16268, 1997 WL 556068 (9th Cir. Sept. 9, 1997) 14

Roy v. Gomez, 81 F.3d 863 (9th Cir.) (*en banc*),
vacated and remanded, California v. Roy, 117 S.Ct. 337 (1996),
on remand, 108 F.3d 242 (9th Cir. 1997)(*en banc*),
cert. denied, 1997 WL 438240 (U.S. Oct. 6, 1997) 15

Sejman v. Warner-Lambert Co., Inc., 845 F.2d 66 (4th Cir. 1988) 9

Sherman v. Smith, 89 F.3d 1134 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 765 (1997) ... 13

Starr v. Lockhart, 23 F.3d 1280 (8th Cir.),
cert. denied, 513 U.S. 995 (1994) 13

State v. Jeffries, 105 Wash. 2d 398, 717 P.2d 722,
cert. denied, 479 U.S. 922 (1986) 1, 3, 22

TABLE OF AUTHORITIES

Page No.:

Cases Cited:

Thompson v. Borg, 74 F.3d 1571 (9th Cir.), *cert. denied*, 117 S.Ct. 227 (1996) 9, 19

Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997), *cert. granted*, 1997 WL 434000 (U.S. Aug. 4, 1997), *as amended*, 1997 WL 524896 (U.S. Aug. 26, 1997) 11

Turner v. Louisiana, 379 U.S. 466 (1965) 24

United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994) 15

United States v. Hernandez-Escarsega, 886 F.2d 1560 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990). 20

United States v. Johnston, 268 U.S. 220 (1925) 7

United States v. Moored, 38 F.3d 1419 (6th Cir. 1994) 9

Venn v. St. Paul Fire & Marine Ins. Co., 99 F.3d 1058 (11th Cir. 1996) 9

Statutes and Rules Cited:

Supreme Court Rule 10 ..... 6, 7

Washington Revised Code § 10.95.020 (1983) 2

United States Constitution:

Amendment VI 1

Amendment VIII 1

Amendment XIV 1

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part as follows:

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to [trial] by an impartial jury of the district wherein the crime shall have been committed; [to] be confronted with the witnesses against him; [and] to have the assistance of counsel for his defense.

Amendment VIII

> [C]ruel and unusual punishments [shall not be] inflicted.

Amendment XIV

> No State [shall] deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE[1]

For two months in early 1983, Patrick Jeffries lived with Phillip and Inez Skiff in rural Clallam County, Washington. He had befriended the couple, who admired his wood sculptures, while serving a prison term in Canada; he went to their home upon his release. The Skiffs provided Mr. Jeffries food and shelter, and gave him tools and materials for wood-carving. The relationship between Mr. Jeffries and the Skiffs was amicable; for example, they allowed him to house-sit alone during their extended absence in February, when they traveled to California.

---

[1] Where not otherwise specified, this statement of facts is drawn from *State v. Jeffries*, 105 Wash. 2d 398, 717 P.2d 722, 726-28, *cert. denied*, 479 U.S. 922 (1986).

There were no eyewitnesses to the deaths of the Skiffs, and no murder weapon was ever found. Mr. and Ms. Skiff were last seen alive on March 19, around noon and 1:30 p.m., respectively. Late in the afternoon of the same day, Mr. Jeffries tried to sell a television set belonging to the Skiffs to some neighbors. That evening, he was seen at a bar with a large amount of cash, spending freely. Four days later, Mr. Jeffries left the area in the Skiffs' truck, with some of their property, including a chain saw, a television, food, and blankets. He was arrested a few days later in Wenatchee, Washington.

The prosecution charged Mr. Jeffries with 2 counts of aggravated first-degree murder, alleging two aggravating circumstances: that he murdered the Skiffs (1) "to conceal the commission of a crime or the identity of a person committing a crime"; and (2) "as part of a common scheme or plan."[2] At several points before and during trial, the prosecution sought leave to admit evidence of Mr. Jeffries' prior felony convictions from Canada, including a conviction for armed robbery. *See, e.g.*, 7 REC 2110-13; 10 REC 3326-33; 11 REC 3563-68. Despite having repeated opportunities to do so, however, the prosecution could not show that Mr. Jeffries had been represented by counsel in those cases. 10 REC 3327 (trial court's statement that "the evidence . . . does not show that the Defendant was represented by Counsel [in the cases that led to his Canadian convictions]"); 11 REC 3568

[2] In order to convict a defendant of aggravated first-degree murder under Washington law, the jury must find the defendant guilty of premeditated murder and find one of several defined aggravating circumstances to exist beyond a reasonable doubt. *See* Wash. Rev. Code §10.95.020 (1983). The jury must make this finding with respect to the existence of aggravating circumstances at the "guilt phase" of trial.

(trial court's statement that "counseled convictions . . . have not been proven [and so this evidence] will not be admitted"). Accordingly, the trial judge excluded this evidence.

At trial, the prosecution pursued a single factual theme in presenting and arguing its entirely circumstantial case: that Mr. Jeffries murdered the Skiffs to rob them of their property. For example, the prosecutor hammered home this theory in closing argument at the guilt phase of trial: "The defendant wanted some property and he had to kill for it and he had to kill both of them in order to get away with it." 11 REC 3503; *see also* 11 REC 3502, 3530, 3532. On direct review, the Washington Supreme Court acknowledged that "the jury's findings and verdict [were] that defendant killed the victims in order to steal their property and to prevent his identification as their killer." *State v. Jeffries*, 105 Wash. 2d 398, 717 P.2d 722, 728, *cert. denied*, 479 U.S. 922 (1986). However, the weight of the evidence supporting the aggravating factors was slight; it barely survived, by a five to four vote, the "substantial evidence" test on direct appeal. *State v. Jeffries*, 717 P.2d at 749 (Pearson, J., dissenting) (since the evidence showed that Mr. Jeffries had had multiple prior opportunities to steal the Skiffs' property without having to kill them to do so, "[a] fair evaluation of the evidence merely shows that Jeffries murdered the Skiffs and *subsequently* stole some of their property"; because the evidence did not show conclusively that "the *purpose* of the killing" was to facilitate the theft, the aggravating factors could not be sustained) (both emphases in original).

Eight days after the jury returned its sentencing verdict against Mr. Jeffries, and two days before he was formally condemned to die by the trial court, juror Kathleen Sims signed

a sworn affidavit stating that, during trial, one of the jurors had made a statement to the rest of the jury about Mr. Jeffries' "past record."[3] 15 REC 4912. Juror Sims' affidavit was filed with Mr. Jeffries' motion for new trial, which the trial court denied without considering Ms. Sims' affidavit. 11 REC 3639-40; 15 REC 4918; 16 REC 4988.

About two years later, juror Thomas Tyszko, who had never had contact with Ms. Sims after the end of trial, approached one of Mr. Jeffries' trial attorneys in a local tavern and shared a more detailed, and troubling, version of the same events. According to juror Tyszko, sometime shortly after the State began to present its circumstantial case against Mr. Jeffries, another juror "stated to the entire jury in the jury room" that Mr. Jeffries was "a convicted armed robber." 19 REC 5804, 5855-56. The juror added, "'Oh, we're not supposed to know that, are we?'" 19 REC 5855. A "dead silence" followed the juror's remarks. *Id.* His comment about Mr. Jeffries' prior record, accompanied by "a smirk," left juror Tyszko "with [the] clear implication that he considered the trial a waste of time." *Id.*

---

[3] Petitioner misleads the Court in reciting the procedural history of Mr. Jeffries' case. Petitioner states that "approximately two years after his trial," Mr. Jeffries filed a state post-conviction proceeding to raise his claim of juror misconduct. Petition for Writ of Certiorari at 5. Petitioner further states that Mr. Jeffries filed affidavits from jurors Sims and Tyszko at that time, in support of his claim. *Id.* Then, Petitioner recites the Washington Supreme Court's holding that "Over two and a half years passed between the trial and the time the alleged misconduct was discovered, indicating that the jurors involved did not believe [it] significant." *Id.* at 5-6.

Petitioner nowhere acknowledges that Ms. Sims first brought the jury misconduct to the trial court's attention only *days*, not years, after Mr. Jeffries' trial. *See* Respondent-Appellant's Excerpt of Record in *Jeffries v. Wood*, No. 95-99003, U.S. Ct. App. 9th Cir., at Tab 27, p. 2 n.1 (opinion of the district court, noting that "Ms. Sims' first affidavit was signed on November 16, 1983"). Given that this fact was a subject of focused attention in the *en banc* court below, *see Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir. 1997) (acknowledging that "neither party disputes that the Washington Supreme Court factually erred on this pivotal point"), Petitioner's misleading description of the facts in this Court is difficult to excuse as accidental.

Juror Tyszko informed counsel that he had been "deeply troubled" by these comments for a long time after trial, which finally led him to come forward. *Id.*

During the course of post-conviction proceedings in state and federal court, jurors Tyszko and Sims testified both live and by affidavit,[4] providing additional detail concerning the juror's comments about Mr. Jeffries' prior conviction during trial. For example, juror Sims recalled that the juror who mentioned Mr. Jeffries' prior record did so in "a rather disgruntled tone of voice," confirming juror Tyszko's clear recollection that the juror had communicated his attitude that the whole trial was "a waste of time." Respondent-appellant's Excerpt of Record in *Jeffries v. Wood*, No. 95-99003, U.S. Ct. App. 9th Cir. (hereinafter ER), at Tab 18, p. 8. Juror Tyszko further described the juror's tone as "mocking"; and confirmed that "the whole jury" must have heard the remark. ER at Tab 21, pp. 92, 97. At one juncture juror Sims stated that "[d]uring the deliberation regarding his sentence, there was some discussion of Mr. Jeffries character in the light of his possible record." 19 REC 5854.

The federal district court, after reviewing "all past testimony," ultimately found that jurors Tyszko and Sims were "credible witnesses whose accounts remained consistent and were not contradictory," and concluded without qualification that they "were telling the truth." ER at Tab 27, p. 2.

---

[4] Prior to her live testimony in federal district court, juror Sims had submitted four affidavits (the first of which was submitted eight days after trial) and one letter concerning the juror's remark. Juror Tyszko submitted three separate affidavits in addition to testifying under oath and withstanding cross-examination.

REASONS FOR DENYING THE WRIT

No compelling reason exists for this Court to review the judgment of the *en banc* Court of Appeals, which rests on the "law of the case" doctrine and neither creates nor reflects any conflict of interpretation among the lower courts.[5] *See* Sup. Ct. R. 10 ("certiorari will be granted only for compelling reasons"). Given the facts described above, the four-year-old panel decision adhered to as the law of the case[6] was an unremarkable application of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). That conclusion is consistent with this Court's refusal to hear Petitioner's challenge to the prior ruling itself, *see Blodgett v. Jeffries*, 510 U.S. 1191 (1994), and nothing in the opinion of the *en banc* Court of Appeals altered the earlier panel's analysis. Petitioner asserts, mistakenly, that the *en banc* panel relied on a "presumption of prejudice" to resolve Mr. Jeffries' juror misconduct claim. *See, e.g.*, Petition for Writ of Certiorari (hereafter Pet.) at 15. Claiming to have identified a division of authority about whether such a presumption exists, Petitioner urges the Court to grant certiorari and clarify any uncertainty in the law.

The problem with this reasoning is that a fair reading of the opinions below (as opposed to the brief and misleading quotations surgically extracted by Petitioner), demonstrates that the Court of Appeals invoked no such presumption in Mr. Jeffries' case, but instead faithfully applied the *Brecht* standard. This fact is fatal to both Petitioner's asserted reasons for granting the writ. First, to the extent that any "split" of authority exists

---

[5] The opinion of the *en banc* Court of Appeals in Mr. Jeffries' case has been reported as *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997) (*en banc*).

[6] *See Jeffries v. Blodgett*, 5 F.3d 1180 (9th Cir. 1993).

among the Circuits, it concerns examination of juror misconduct claims on direct review of federal criminal convictions, not on federal habeas corpus review of convictions obtained in state court. Not only did the *en banc* Ninth Circuit in *Jeffries* eschew any presumption of prejudice, but subsequent Ninth Circuit jury misconduct cases demonstrate that no panel of that court understands *Jeffries* to have announced a "presumption of prejudice" for considering such claims. Moreover, this view is consistent with that of every court of appeals to consider the question since *Brecht*.

Petitioner's second Question Presented reveals that the issue Petitioner really wants this Court to consider is not whether *Brecht* applies to juror misconduct claims, but whether the original panel decision, adhered to by the *en banc* panel as the law of the case, correctly applied *Brecht* to the facts of Mr. Jeffries' case. *See, e.g.*, Pet. at 15 (arguing that the *en banc* panel "mishandled" *Brecht*, not that it applied some other standard). It is axiomatic that this Court does not sit to review such fact-intensive questions. *United States v. Johnston*, 268 U.S. 220 (1925) (Supreme Court does not grant certiorari to review evidence and discuss specific facts); Sup. Ct. R. 10 ("certiorari is rarely granted when the asserted error consists of [the] misapplication of a properly stated rule of law") . Petitioner and the dissent below attempt to convert this case-specific inquiry, which would make no new law, into a legal dispute about the meaning of *Brecht*. Even a cursory examination of the relevant opinions, however, demonstrates that both the original panel and its *en banc* successor correctly applied *Brecht*. The judgment reached by the original panel, and subsequently ratified by the *en banc* panel as governed by the law of the case, is unworthy of certiorari review.

A. The Decision below Merely Followed the Previously Established Law of the Case, Which this Court Previously Declined to Review.

Petitioner conspicuously avoids discussing at any length the actual basis for the *en banc* panel's judgment; namely, that the original three-judge panel's decision applying *Brecht* to the facts of Mr. Jeffries' case established the law of the case, which was entitled to be followed thereafter. *See Jeffries*, 114 F.3d at 1488-93 (discussing the law of the case doctrine); *see also id.* at 1509-12 (Kozinski, J., dissenting) (disagreeing with majority's treatment of the doctrine). The *en banc* panel, in the "merits" portion of its opinion, viewed the merits of Mr. Jeffries' juror misconduct claim through the lens of the law of the case doctrine, rather than engaging in *de novo* examination of the claim. The distinction is important at this juncture. First, absent some question of overriding national importance, this Court as a prudential matter ought not grant review of a judgment reached in reliance on the law of the case doctrine unless the lower court's application of that rule is in conflict with the other federal courts of appeal. While the law of the case doctrine is not a limit on judicial power, it nevertheless describes a principle from which courts should not deviate "in the absence of extraordinary circumstances," because the doctrine "promotes the finality and efficiency of the judicial process." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816-17 (1988) (citations omitted). It is apparent that Petitioner can identify no flaw in the Ninth Circuit's application of the law of the case doctrine, because Petitioner has not sought review on that ground.[7]

---

[7] The *en banc* panel's invocation of the law of the case doctrine does not "insulate [the underlying] issue from this Court's review," *Christianson*, 486 U.S. at 817. However, the same institutional considerations that generally support adherence to the law of the case (finality and efficiency)

There is nothing novel about the *en banc* panel's application of the law of the case doctrine to the circumstances presented here. The law of the case doctrine holds generally that the decision of an appellate court on a particular issue must be followed in all subsequent proceedings in the same case, absent certain specified exceptions. The federal courts of appeal, following this Court, have uniformly described those exceptions as permitting reconsideration of a prior decision when (1) the prior decision was "clearly erroneous and would work a manifest injustice;" (2) intervening controlling legal authority has undermined the legal basis for the prior decision; or (3) substantially different evidence was adduced at the intervening trial.[8]

In refusing to follow its own prior decision applying *Brecht* to the facts of Mr. Jeffries' case, the three-judge panel had invoked the first exception, asserting that its prior decision (which this Court had declined to review, and which other panels of the Ninth Circuit had followed without criticism or question[9]) had been "clearly erroneous and would work a manifest injustice." *Jeffries*, 114 F.3d at 1489 (quoting *Jeffries v. Wood*, 75 F.3d 491, 494 (9th Cir. 1996)). The *en banc* panel traced the extensive support for the reasoning

---

deserve attention in determining whether the Court should grant certiorari; in the present case, the *en banc* panel's reliance on the law of the case counsels the Court to deny review.

[8] *See, e.g., Reeves v. AcroMed Corp.*, 103 F.3d 442, 448 (5th Cir. 1997); *Venn v. St. Paul Fire & Marine Ins. Co.*, 99 F.3d 1058, 1063 (11th Cir. 1996); *Pennington v. Doherty*, 110 F.3d 502, 505-06 & n.5 (7th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3086 (U.S. July 3, 1997) (No. 97-58); *United States v. Moored*, 38 F.3d 1419, 1421 (6th Cir. 1994); *Little Earth of the United Tribes, Inc., v. United States Dep't of Housing & Urban Dev.*, 807 F.2d 1433, 1440 (8th Cir. 1986); *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 68 (4th Cir. 1988); *see also Jeffries*, 114 F.3d at 1489 (citing additional authority).

[9] *See, e.g., Thompson v. Borg*, 74 F.3d 1571, 1575 n.1 (9th Cir.), *cert. denied*, 117 S.Ct. 227 (1996); *Lawson v. Borg*, 60 F.3d 608, 612-13 (9th Cir. 1995). District courts within the Ninth Circuit likewise invoked the original panel's analysis without criticism; *see Borja v. Prunty*, 866 F. Supp. 451, 455 (S.D. Cal. 1994).

of each part of the earlier panel opinion, and concluded that no part of that decision could be characterized as "clearly erroneous." *Id.* at 1490-92. The standard for "clear error" in the law of the case context is demanding; to prevail, a party "must show not only that the [earlier holding] was wrong, but that it was clearly wrong." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir.), *cert. denied,* 116 S. Ct. 407 (1995); *see also Christianson*, 486 U.S. at 819 (because law of the case should be "a heavy deterrent to vacillation on arguable issues," it entitles "plausible" decisions to deference) (citation omitted). Given this exacting legal standard, it is perhaps no surprise that Petitioner does not challenge the *en banc* panel's discussion or application of the law of the case doctrine. The fact that the decision below rests on the law of the case, and that Petitioner has asserted no conflict of interpretation among the lower courts concerning that doctrine, supports denial of the writ.

In addition, as the *en banc* panel pointed out, even a showing of "clear error" in the earlier panel opinion would not have entitled Petitioner to a different result after remand unless Petitioner could also demonstrate that a "manifest injustice" would result from adhering to the earlier ruling. *Jeffries*, 114 F.3d at 1492. Neither in its briefing nor at oral argument in the court below could Petitioner make any factual showing of manifest injustice. *Id.* As with the *en banc* panel's treatment of the issue of "clear error" in the earlier panel decision, Petitioner has not challenged the conclusion below that her failure to demonstrate "manifest injustice" would preclude deviation from the law of the case in this matter even if the earlier panel had erred in its disposition.

In sum, the fact that the *en banc* panel rested its judgment on the law of the case doctrine, and in doing so applied those principles consistent with the views of this Court and other Circuits, makes this case singularly unsuitable for plenary review on certiorari.[10]

Finally, as noted, Petitioner's assertions that the Ninth Circuit has failed faithfully to apply *Brecht* in this case should sound familiar, because Petitioner raised near-identical complaints when it sought review of the original panel decision in 1993. *See* Petition for Writ of Certiorari in *Blodgett v. Jeffries*, No. 93-971 (O.T. 1993). That Petition characterized the Ninth Circuit as having held that juror exposure to Mr. Jeffries' prior conviction for armed robbery "presumptively prejudice[d]" him. *Id.* at 13. Petitioner conceded that the three-judge panel had acknowledged "the new standard for harmless error in *Brecht*," *id.* at 10, but insisted that it had adopted a "per se" rule, instead of conducting a case-specific inquiry. *Id.* at 11; *see also id.* at 16 (contending that the panel, although "purport[ing] to invoke the *Brecht v. Abrahamson* harmless error standard," "clearly felt itself bound by" pre-*Brecht* case law); *id.* at 18 (panel's standard of review "is incompatible with *Brecht*"). This Court declined to review the original panel decision. *Blodgett v. Jeffries*, 510 U.S. 1191

---

[10] Judge Kozinski's dissent on the law of the case issue is curiously inconsistent with the strong views he has elsewhere expressed about upholding the finality and stability of prior decisions when they are subsequently called into question. *See Jeffries*, 114 F.3d at 1510 (Kozinski, J., dissenting) (arguing that a court "need not weigh any factors or consider any countervailing considerations" before jettisoning a prior ruling, and that the "law of the case" exceptions should only guide courts in deciding when *not* to exercise this unlimited discretion to reconsider prior rulings). In *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997), *cert. granted*, 1997 WL 434000 (U.S. Aug. 4, 1997), *as amended*, 1997 WL 524896 (U.S. Aug. 26, 1997), Judge Kozinski declared that upsetting an otherwise final judgment, even to correct an acknowledged error in a prior opinion, was unwise because "there are few petitioners who can't make out a colorable claim" of similar circumstances. *Id.* at 1070 (Kozinski, J., dissenting). If this Court's grant of review in *Thompson* reflects a sense that extraordinary steps (*e.g.*, recalling the mandate, or deviating from the law of the case) should be supported by uniquely compelling circumstances, those considerations would counsel against granting certiorari here.

(1994) (denying certiorari). The reasoning of that four-year-old panel decision is no more worthy of plenary review today simply because it has recently been followed by the *en banc* Ninth Circuit as the law of the case.

B. At Least since *Brecht*, No Circuit Court Has Presumed Prejudice When Reviewing Claims of Juror Misconduct Raised by State Prisoners in Federal Habeas Corpus Proceedings.

Petitioner asserts broadly that "[t]he circuit courts are not uniform in their handling of jury misconduct claims involving extrinsic information." Pet. at 12. A string of citations follows. *Id.* However, what Petitioner fails to point out is that any "dispute" among the circuit courts over whether to presume prejudice in reviewing claims of juror misconduct exists only with respect to the direct review of federal criminal convictions -- not habeas corpus review of state convictions, as in Mr. Jeffries' case. All the cases Petitioner cites, save one, fall into the former category. As demonstrated below, there is no such "dispute" in the federal habeas corpus context. Three Circuits take precisely the same position as the *en banc* Ninth Circuit below; more important for present purposes, no decision of any Circuit is to the contrary.

This conclusion -- that since *Brecht*, the circuit courts to address the question have unanimously rejected the application of a "presumption of prejudice" in reviewing juror misconduct claims on habeas corpus review of state convictions -- is illustrated by the sole habeas corpus case Petitioner cites.[11] In *Bibbins v. Dalsheim*, 21 F.3d 13 (2d Cir.), *cert.*

---

[11] The only Circuit which might not concur that *Brecht* is the correct standard would impose a less stringent burden than the standard under which Mr. Jeffries prevailed in the court below. The Eighth Circuit has held that where the state court failed to review a habeas petitioner's claim under the harmless

denied, 513 U.S. 901 (1994), the Second Circuit cited the "limited" nature of its "review of the effect of constitutional errors on a state court conviction" in concluding that no "presumption of prejudice" applies in such cases. *Id.* at 16 (requiring petitioner to show "actual prejudice" from the claimed misconduct, citing *Brecht*).

But *Bibbins* does not stand alone; other cases readily demonstrate that the courts of appeal understand that, after *Brecht*, they may not presume prejudice from juror misconduct on habeas corpus review. In *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 765 (1997), for example, the *en banc* Fourth Circuit strongly rejected the notion that juror misconduct claims were not subject to harmless error review under *Brecht*. *Id.* at 1137-41 (summing up the court's position by declaring that "[w]e shall adhere consistently to the *Brecht* standard in collateral proceedings"). Nor does the Eleventh Circuit rely on any "presumption of prejudice" when reviewing jury misconduct claims by state prisoners seeking federal habeas relief. *See, e.g., Bonner v. Holt*, 26 F.3d 1081, 1082-84 (11th Cir. 1994), *cert. denied,* 514 U.S. 1010 (1995) (applying *Brecht* in granting relief on claim that jurors were exposed to extrinsic information about defendant's prior criminal record).

If Petitioner's claim that *Jeffries* announced a "presumption of prejudice" for reviewing jury misconduct claims were true, one would expect to find subsequent Ninth Circuit panels employing, or at least acknowledging, such a presumption. But no Ninth

---

error standard of *Chapman v. California*, 386 U.S. 18 (1967), the federal habeas court should use *Chapman*, rather than *Brecht*, in conducting its review. *See, e.g., Starr v. Lockhart*, 23 F.3d 1280, 1291-92 (8th Cir.), *cert. denied*, 513 U.S. 995 (1994). It is also conceivable, although no Circuit has so held, that juror misconduct of the sort at issue here should not be considered "trial-type" error under *Arizona v. Fulminante*, 499 U.S. 279, 306-10 (1991), because its effect cannot be "quantitatively assessed." In any event, as noted in the text, *supra,* because the Circuits to face the question have unanimously agreed that *Brecht* is the appropriate standard in cases such as Mr. Jeffries', the Court need not review this issue.

Circuit panel has done so. In *Rodriguez v. Marshall*, No. 96-16268, 1997 WL 556068 (9th Cir. Sept. 9, 1997), for example, the panel asserted that "[o]n habeas review, Rodriguez bears the burden of establishing that [the jury's exposure to extrinsic information] had a 'substantial and injurious effect or influence in determining the jury's verdict,'" citing *Brecht*. *Id.* at *3; *see also id.* at *5 (same). In a flat rejection of the position Petitioner claims is now the law in the Ninth Circuit, the *Rodriguez* court emphasized that "there is no authority for the proposition that prejudice is presumed from the mere existence of juror misconduct." *Id.* at *6. One observation in particular refutes Petitioner's characterization of the holding of the *en banc* court in *Jeffries*: replying to "Rodriguez's contention that *Jeffries* establishes a rule that any and all incidents of internal juror misconduct create a strong presumption of prejudice," the court responded that the *en banc* panel "made clear ... that our traditional inquiry into the prejudicial effect of the extrajudicial information remains at the heart of our inquiry into whether habeas relief is warranted on the facts of a particular case." *Id.* at *11 n.4 (citing *Jeffries*, 114 F.3d at 1490-92). Other post-*Jeffries* Ninth Circuit habeas cases concerning juror misconduct likewise employ *Brecht* without reference to any presumption of prejudice. *See, e.g., Dyer v. Calderon*, 1997 WL 559868, at *20 (9th Cir. Aug. 19, 1997) (to be reported at 122 F.3d 720) (applying *Brecht* and noting that "presum[ing] prejudice" from juror misconduct on habeas review "is not the law of our circuit," citing *Lawson v. Borg*, 60 F.3d 608, 612 (9th Cir. 1995)).

These cases expose Petitioner's alleged "conflict among the circuits" as illusory. Since *Brecht*, no Circuit has employed a presumption of prejudice in assessing harm from

a claim of juror misconduct by a state prisoner in federal habeas corpus proceedings. The *en banc* panel in *Jeffries* did not employ such a presumption, and other panels of the Ninth Circuit following *Jeffries* have expressly rejected the notion that it did. As it has done in every other federal habeas case applying *Brecht* to a claim of juror misconduct, the Court should deny certiorari.

Petitioner contends that in addition to the dispute over whether to presume prejudice from juror misconduct, there is a further conflict over whether "the source [of] extraneous information" is dispositive of the question of harm. Pet. at 13, citing *United States v. Bertoli,* 40 F.3d 1384, 1394-95 (3d Cir. 1994). *Bertoli* concerned premature deliberations by jurors rather than their exposure to information that was not properly admitted from the witness stand, and its relevance to this very different context is questionable. In any event, the existence of one easily distinguishable case does not establish an important conflict of interpretation. The overwhelming majority of courts have sensibly concluded not to focus primarily on the source of the information, but to weigh the content of the information in the context of all other relevant circumstances of the case. *Jeffries*, 114 F.3d at 1490 n.4 (collecting cases). No conflict on this issue requires this Court's intervention.[12]

---

[12] We note that Petitioner repeatedly attempts to analogize the *en banc* panel's decision below to the actions of the Ninth Circuit in an earlier opinion which required correction by this Court. *See* Pet. at 11, 15, 20; *see also Roy v. Gomez*, 81 F.3d 863 (9th Cir.) (*en banc*), *vacated and remanded, California v. Roy*, 117 S.Ct. 337 (1996), *on remand*, 108 F.3d 242 (9th Cir. 1997) (*en banc*) (denying habeas relief), *cert. denied*, 1997 WL 438240 (U.S. Oct. 6, 1997). Reviewing harm from a jury-charge error on habeas corpus in *Roy*, the Ninth Circuit had "appl[ied] the analysis developed by Justice Scalia in his concurring opinion in *Carella v. California*." *Roy*, 81 F.3d at 866 (citation omitted). This Court summarily vacated the judgment of the Court of Appeals, holding that it had created a "special standard" for measuring harm which was distinct from *Brecht*. *Roy*, 117 S.Ct. at 338-39. The Court remanded for reconsideration of the issue under *Brecht*, and on remand the Ninth Circuit found the error harmless under *Brecht* and denied relief. *Roy*, 108 F.3d at 243. The most immediately apparent distinction between *Roy* and the present

C. The Application of *Brecht v. Abrahamson* to the Jury Misconduct in this Case No More Warrants this Court's Review Now than it Did in 1994.

Contrary to Petitioner's characterization of the Court of Appeals' analysis of Mr. Jeffries' juror misconduct claim, the court below did not presume prejudice in determining whether the standard of *Brecht v. Abrahamson,* 507 U.S. 619 (1993), had been met in this case. On the contrary, the Court of Appeals' majority carefully and explicitly reviewed the factors supporting its conclusion that the jurors' exposure to information about Mr. Jeffries' uncounseled prior convictions was harmful enough to require a new sentencing hearing. Indeed, the court below did not even think the question was close enough to require resort to the rule of *O'Neal v. McAninch*, 513 U.S. 432 (1995) (where federal habeas court is "in equipoise" with respect to whether a petitioner was harmed by a violation of his constitutional rights, it must grant relief). A summary examination of the Ninth Circuit's application of *Brecht* to the facts of this case demonstrates that certiorari review on this fact-specific issue is unwarranted, because both the three-judge panel and the *en banc* panel correctly applied *Brecht* in holding that Mr. Jeffries suffered substantial harm from the jury's exposure to information about his uncounseled prior robbery conviction.

The Court of Appeals began with a statement that plainly bedevils Petitioner -- that the information about Mr. Jeffries' uncounseled prior robbery conviction "by its nature was

---

case is that the Ninth Circuit in *Roy* openly disavowed *Brecht* in favor of a novel harm test derived from *Carella*. This Court understandably found it necessary to provide additional guidance. In Mr. Jeffries' case, by contrast, the Ninth Circuit since *Brecht* has never suggested that *Brecht* was not the appropriate standard for conducting a harm analysis. On the contrary, both the original panel opinion and the *en banc* panel opinion endorsing the earlier analysis as the "law of the case" specifically cite and apply *Brecht*. Neither opinion purports to create any new or hybrid standard. Petitioner's strained attempt to invoke *Roy,* therefore, is unavailing.

intrinsically prejudicial." *Jeffries,* 114 F.3d at 1491; *see also id.* (the information carried "inherent prejudice"). Seizing upon this wording, Petitioner draws the sweeping conclusion that the *en banc* panel created a "presumption of prejudice" for reviewing claims of juror misconduct. A fairer reading of the passage as a whole is that otherwise inadmissible information about the defendant's prior criminal record is frequently, but not inevitably, prejudicial -- because it supports the strong common sense inference that the defendant, having committed a similar crime in the past, is probably guilty of the current charge. After all, the *en banc* panel went on to discuss the various specific factors that could lead a reviewing court to conclude that the defendant suffered no "actual and substantial" harm from the jury's exposure to such information. *See Jeffries*, 114 F.3d at 1491-92; *see also infra.* If the panel had concluded that the nature of the information about Mr. Jeffries' prior conviction for robbery foreclosed a finding of "no prejudice," it would hardly have bothered listing all the other factors supporting its ultimate conclusion. Indeed, the *en banc* Ninth Circuit concluded that Mr. Jeffries suffered prejudice with respect to the jury's findings of aggravating circumstances, but not with respect to its verdict finding him guilty of first-degree murder (warranting relief from his death sentences, but not his convictions). *Jeffries*, 114 F.3d at 1493. That outcome is impossible to reconcile with Petitioner's characterization of the panel's reasoning.

Put another way, there is nothing inconsistent with *Brecht* in saying that the essence of this particular information -- extrinsic information about Mr. Jeffries' prior uncounseled conviction -- is something that would often cause a judge to have a "grave doubt," or more,

about the fairness and reliability of the jury's findings on the aggravating circumstances. As the original panel opinion pointed out, the extrinsic information was "both directly related to a material issue in the case and highly inflammatory." *Jeffries*, 5 F.3d at 1190 (citation omitted). The panel went on to observe, correctly, that where the extrinsic information concerns a prior conviction similar to the charge at issue, there is a high risk that jurors may be "overwhelmed" by "the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again." *Id.* at 1191 (citation omitted). Just last Term, this Court strongly cautioned against the same tendency in an analogous context. *See Old Chief v. United States*, 117 S.Ct. 644, 652 (1997) (warning that jurors may be "lure[d] into a sequence of bad character reasoning" when they are aware of "the name or nature of the [defendant's] prior offense"; when the prior offense is "similar to other charges in [the] pending case the risk of unfair prejudice [is] especially obvious"). Thus understood, both the original panel decision and its *en banc* successor are directly in line with the innumerable cases which have long recognized that extraneous evidence of a defendant's prior criminal activity usually has a highly prejudicial effect on the jury. *See, e.g., Mattox v. United States*, 146 U.S. 140, 150 (1892). Even the *en banc* dissenters acknowledged that some types of information (such as the fact of a suppressed confession, a previously withdrawn plea of guilty, or a prior conviction for an "inflammatory crime, like child molestation") carry inherent prejudice. *See Jeffries*, 114 F.3d at 1508 n.12 (Kozinski, J., dissenting). The *en banc* majority's description of the information about Mr. Jeffries' prior

uncounseled robbery conviction as "inherently" prejudicial simply acknowledged that, in the context of this case, this was such information.

The *en banc* panel did not say that the nature of the extrinsic information alone required a finding that the violation of Mr. Jeffries' rights was both "injurious" and "substantial." It considered a number of possible factors that could support a finding of no "actual and substantial" harm, and showed why none of them applies to this case. For instance, the panel acknowledged that if the extraneous information were "otherwise admissible or merely cumulative of other evidence adduced at trial," less prejudice would probably result. *Jeffries*, 114 F.3d at 1491. That was emphatically not the case in Mr. Jeffries' trial; the prosecution was expressly forbidden from introducing evidence of his prior convictions, because there was no showing he had been represented by counsel in those cases. The panel also observed that if the prejudicial statement were "ambiguously phrased," it might have carried less weight. *Id.* & n.7 (citing, by way of contrary illustration, *Thompson v. Borg*, 74 F.3d 1571, 1576 (9th Cir.) (affirming finding of no prejudice in part because juror's remark about defendant's having previously withdrawn a guilty plea was "vague and awkwardly phrased"), *cert. denied*, 117 S. Ct. 227 (1996)). Here, there was no ambiguity in the declaration that Mr. Jeffries was "a convicted armed robber."

The panel further noted that the existence of "a curative instruction [or] some other step taken to ameliorate the prejudice" could support a finding of "no harm." 114 F.3d at 1491. In Mr. Jeffries' case, of course, the juror misconduct was not brought to light before the trial concluded, so no ameliorative steps could be taken to reduce the harm to Mr.

Jeffries. This factor, too, supports the *en banc* panel's conclusion that Mr. Jeffries suffered "actual and substantial" prejudice from the jury's awareness of his prior uncounseled robbery conviction.[13]

The *en banc* panel identified two other factors which deserved consideration in the *Brecht* analysis: the "trial context" and "the issues and evidence in the case." *Jeffries*, 114 F.3d at 1491-92. It described the former with reference to a prior Ninth Circuit opinion on jury misconduct, *Bayramoglu v. Estelle*, 806 F.2d 880 (9th Cir. 1986), which the original panel opinion had found instructive in applying *Brecht*. *See Jeffries*, 114 F.3d at 1491-92 n.10; *see also Jeffries,* 5 F.3d at 1190. *Bayramoglu* emphasized that a court reviewing a claim of juror exposure to extrinsic information should consider (1) whether the information was actually received; (2) the length of time the information was available to the jury; (3) the extent to which the jurors discussed and considered it; (4) whether the material was introduced before a verdict was reached; and (5) any other matters that might bear on the issue. *Bayramoglu,* 806 F.2d at 887. This approach was consistent with the way in which courts are to apply existing precedent under the *Brecht/Kotteakos* standard. "In the final analysis judgment in each case must be influenced by conviction resulting from examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Brecht*, 507 U.S. at 641-42 (Stevens, J., concurring) (quoting *Kotteakos v. United States*, 328 U.S. 750, 762 (1946)).

---

[13] This fact distinguishes Mr. Jeffries' case from, *e.g.*, *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1580-81 (9th Cir. 1989) (finding harmless error where, *inter alia*, trial judge gave a specific curative instruction immediately upon learning that jurors had access to potentially harmful extraneous information), *cert. denied*, 497 U.S. 1003 (1990).

Each of these factors supports the original panel's finding of "actual and substantial" prejudice to Mr. Jeffries. The district judge specifically found that statements were made in the presence of the jurors regarding Mr. Jeffries' having a record or a prior conviction for armed robbery. Her findings also establish that the extrinsic information about Mr. Jeffries' prior conviction was received by the jurors very early in the trial, and thus that the jurors who heard this information had it to consider during most of the presentation of the state's case. ER at Tab 27, p. 2; 19 REC 5804, 5855-56. In that presentation, of course, the prosecution was attempting to prove by circumstantial evidence that Mr. Jeffries was motivated to kill the Skiffs by his desire to steal their property. The jurors' early receipt of the extraneous information concerning Mr. Jeffries' prior criminal record meant that they filtered virtually the state's entire circumstantial case through their understanding that Mr. Jeffries "had a record" or, worse, "an armed robbery conviction." Furthermore, the extraneous information was introduced into the jury room before a verdict was reached, and the jurors deliberated for nine and a half hours before concluding that Mr. Jeffries was guilty of aggravated murder.[14] All these factors support the original panel's finding that Mr. Jeffries suffered substantial prejudice from the jurors' exposure to information about his prior uncounseled robbery conviction.

---

[14] The panel's decision was consistent with earlier Ninth Circuit authority on what inference to draw from the length of jury deliberations in a case where the jurors are later learned to have been exposed to extrinsic information. *See, e.g., Gibson v. Clanon*, 633 F.2d 851, 855 & n.8 (9th Cir. 1980) (prejudice from jury misconduct was manifest where jury deliberated for nine hours despite "strong" evidence against petitioner), *cert. denied*, 450 U.S. 1035 (1981). As noted, Mr. Jeffries' jury deliberated for nine and a half hours before reaching its verdict on the aggravating factors, on evidence that barely survived sufficiency review on direct appeal. The dissent below, which characterized those deliberations as "lightning quick," conspicuously failed to acknowledge, much less attempt to distinguish, *Gibson*. *See Jeffries*, 114 F.3d at 1508 (Kozinski, J., dissenting).

Finally, the "issues and evidence" at Mr. Jeffries' trial support the conclusion that the jurors' exposure to information about Mr. Jeffries' prior uncounseled robbery conviction was harmful. *See Jeffries*, 114 F.3d at 1490-92. As noted by the *en banc* majority below, the jury made two special findings that supported Mr. Jeffries' conviction for aggravated first-degree murder and the imposition of the death sentence. *Id.* at 1490. Those aggravating circumstances were that the murders were committed (1) to conceal the commission of a crime and (2) as part of a common scheme or plan. *Id.* at 1491. As the *en banc* majority correctly points out (and as Petitioner apparently concedes), "[t]he only crime referenced at trial was the crime known in common parlance as robbery; the only 'common scheme or plan' involved the commission of robbery." *Id.; see also id.* n.6 (citing *State v. Jeffries*, 717 P.2d at 735) ("It is clear from the record that the State's argument [at trial] was that the defendant killed the victims in order to steal their property")). As four dissenting Justices of the Washington Supreme Court pointed out on direct appeal, there was also evidence from which the jurors could reasonably have concluded that Mr. Jeffries killed the Skiffs for some unrelated reason, and then stole some of their property as an afterthought when he took flight. *Jeffries*, 717 P.2d at 749 (Pearson, J., dissenting). Such an inference, of course, would be nearly impossible to draw after being told that Mr. Jeffries was "a convicted armed robber." Under these specific circumstances, it is unremarkable that the original panel found that the jurors' exposure to information about Mr. Jeffries' prior robbery conviction caused him "actual and substantial" prejudice. It is equally unsurprising that the *en banc* court

subsequently ratified that finding as "not clearly erroneous" under the law of the case doctrine.

In sum, the jurors who convicted Mr. Jeffries of aggravated first-degree murder and sentenced him to death were exposed to unambiguous, inadmissible information of a type that was especially prejudicial because of the nature of the evidence and the issues in the case. They received this potent information early in the trial and no subsequent steps were taken to cure the error or ameliorate the resulting harm. They deliberated for nine and a half hours before determining that the two aggravating factors alleged by the prosecution were present, on evidence which barely survived a sufficiency challenge on direct review. The court below, in finding that these facts show "actual and substantial" prejudice from the jurors' exposure to information about Mr. Jeffries' prior uncounseled robbery conviction, faithfully applied the standard of *Brecht v. Abrahamson.*

CONCLUSION

The *en banc* panel, rather than creating some novel "presumption of prejudice," simply adopted the law of the case in applying the harm test of *Brecht v. Abrahamson* to the facts of Mr. Jeffries' claim of juror misconduct -- following the well-supported reasoning of a decision this Court had earlier declined to review. In applying *Brecht* to Mr. Jeffries' claim, both the original panel and its *en banc* successor decided this case in a manner squarely consistent with the views of the other federal circuit courts to face the issue since *Brecht.*

In the final analysis, the Ninth Circuit's conclusion that Mr. Jeffries is entitled to a new determination of the disputed aggravating circumstances in his case simply reflects this Court's consistent teaching since the eighteenth century. The jury trial guarantee of the Sixth Amendment requires that the jury's verdict "be based upon the evidence developed at the trial," regardless of the heinousness of the crime or the apparent guilt of the accused. 1 *Burr's Trial* 416 (1807); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). This basic principle "goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury. ... [i]n the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965). The jury's exposure to information about Mr. Jeffries' prior armed robbery conviction plainly abridged this right. Moreover, the trial judge had properly excluded evidence of Mr. Jeffries' prior convictions because the prosecution, despite repeated opportunities to do so, could not establish that they were counseled; this fact further demonstrates that the earlier panel decision, upheld as the law of the case, was correct. *See, e.g., Burgett v. Texas*, 389 U.S. 109, 115 (1967) (admission of prior uncounseled conviction is prejudicial even where jury explicitly instructed to disregard it); *Custis v. United States*, 511 U.S. 485, 494-97 (1994) (reaffirming *Burgett*; because *Gideon* error is a "unique constitutional defect," a judgment relying on an uncounseled conviction cannot stand regardless of the substantial competing interest in "finality of judgments").

For the foregoing reasons, the petition for writ of certiorari should be denied.

DATED this 10th day of October, 1997.

Respectfully submitted,

Stephanie Ross*
345 Knechtel Way
Suite 100B
Bainbridge Island, WA 98110
(206) 780-8276

Robert S. Mahler
MacDonald, Hoague, & Bayless
705 Second Avenue, 15th Floor
Seattle, WA 98104
(206) 622-1604

Thomas W. Hillier, II
Peter Offenbecher
Robert C. Owen
Federal Public Defender
1111 Third Ave., Ste. 1100
Seattle, WA 98101
(206) 553-1100

Counsel for Petitioner

* Counsel of Record

ORIGINAL

NO. 97-289

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TANA WOOD,
Petitioner,

vs.

PATRICK JAMES JEFFRIES,
Respondent.

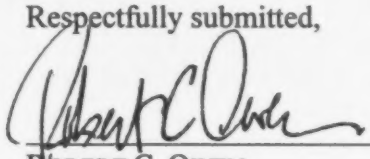
On Petition For Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that three true and correct copies of Respondent's Motion for Leave to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari have been served upon counsel for Petitioner by placing same into the United States Mail, first-class postage prepaid, addressed to: Paul D. Weisser, Asst. Attorney General, P.O. Box 40116, Olympia, WA 98504-0116, on this date. Undersigned counsel further certifies, pursuant to Sup. Ct. R. 29, that all parties required to be served have been served.

DATED this 17th day of October, 1997

Respectfully submitted,



ROBERT C. OWEN
Federal Public Defender
1111 Third Avenue, Ste. 1100
Seattle, Washington 98101

Member, Supreme Court Bar
COUNSEL FOR RESPONDENT

FEDERAL PUBLIC DEFENDER
Western District of Washington

October 10, 1997

Office of the Clerk
Supreme Court of the United States
1 First Street, NE
Washington, D.C. 20543-0001

RE: *Wood v. Jeffries*, No. 97-289

Dear Sir or Madam:

Enclosed for filing please find the original and ten copies of each of the following documents in the above-styled case:

Respondent's Motion for Leave to Proceed *In Forma Pauperis*

Brief in Opposition to Petition for Writ of Certiorari

Certificate of Service

We have enclosed one additional copy of each document to be file-stamped and returned in the enclosed self-addressed stamped envelope. Thank you very much for your kind attention to this matter.

Very truly yours,

Robert C. Owen
Counsel for Respondent
PATRICK JAMES JEFFRIES

RECEIVED
OCT 21 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

cc: Paul D. Weisser, Esq., Counsel for Petitioner

1111 Third Avenue, Ste. 1100, Seattle, Washington 98101 • Telephone (206) 553-1100 • Fax (206) 553-0400

NO. 97-289

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

TANA WOOD,
Petitioner,

vs.

PATRICK JAMES JEFFRIES,
Respondent.

On Petition For Writ of Certiorari to
The United States Court of Appeals
For the Ninth Circuit

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that three true and correct copies of Respondent's Motion for Leave to Proceed In Forma Pauperis and Brief in Opposition to Petition for Writ of Certiorari have been served upon counsel for Petitioner by placing same into the United States Mail, first-class postage prepaid, addressed to: Paul D. Weisser, Asst. Attorney General, P.O. Box 40116, Olympia, WA 98504-0116, on this date. Undersigned counsel further certifies, pursuant to Sup. Ct. R. 29, that all parties required to be served have been served.